Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

NOV 24 2000

No. 99-2047

In the Supreme Court of the United States

ANTHONY PALAZZOLO, *Petitioner*,

v.

RHODE ISLAND *ex rel.* PAUL K. TAVARES, AND COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ Of Certiorari To The Supreme Court of Rhode Island

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND RHODE ISLAND FARM BUREAU IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a regulatory taking is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "less ambitious uses" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero.

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INTEREST OF THE AMICI CURIAE[1]

The American Farm Bureau Federation ("AFBF") was established in 1920 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.9 million member families. AFBF's farmer and rancher members own or lease significant amounts of land, on which they depend for their livelihoods and on which all Americans depend for high quality, affordable food and other basic necessities. Because that land is subject to increasingly onerous regulation from all levels of government—such as the state wetlands regulation at issue in this case—AFBF and its members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause when regulation goes too far. Accordingly, AFBF has participated as an amicus in this Court in support of landowners in takings cases such as *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), as well as in cases concerning the permissible scope of federal land use regulation such as *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178.

The Rhode Island Farm Bureau ("RIFB") is a voluntary, non-profit organization with 2800 members which advocates for those involved in Rhode Island agriculture and rural living. It is the policy of RIFB, adopted by vote of its members, "to protect the right of private owners in questions concerning the use of private

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

property for the public good. That right shall be a just compensation for use taken."

Because the land of many of Rhode Island's commercial farmers abuts Narragansett Bay, Rhode Island Sound, or the tidal Sakonnet River, farmers generally must obtain a permit from respondent Coastal Resource Management Council ("CRMC") before they can make full use of their land. RIFB has been active in attempting to constrain CRMC's powers through legislation and in seeking to protect Rhode Island's farm community by advocating state takings legislation—ultimately without success. As the opportunity to make a moderate living from agriculture is diminishing, farmers need the protection of the Fifth Amendment and the federal courts if they are to find economically feasible ways to use their land and remain in the agricultural business.

SUMMARY OF ARGUMENT

This case presents three issues of great importance to AFBF, RIFB, and their members. First, farmers and ranchers are threatened by formalistic rules that measure "investment backed expectations" as at the time of a transfer of property that occurs by operation of law—here, the 1978 transfer from petitioner Anthony Palazzolo's single-shareholder corporation to Palazzolo in his personal capacity when Rhode Island revoked his corporation's charter—or that otherwise do not occur as the result of an arms-length sale. Farm and ranch properties often are owned and worked by the same family for generations—facilitated by transfers among individuals, family corporations, and family partnerships. Those sorts of bequests and formal transfers—still less involuntary transfers by operation of law like that involved here—should have no substantive effect at all on determining a landowner's reasonable investment backed expectations.

Second, ripeness rules that require landowners to return repeatedly to regulating agencies with more and more limited and

less and less economically viable plans encourage gamesmanship on the part of regulators aware that they can delay or avoid a takings claim by dragging out the administrative process in this way. See *City of Monterey*, 526 U.S. 687. Such rules especially threaten the rights of farmers and ranchers, who generally lack the financial resources to engage in extended administrative proceedings.

In this brief, however, AFBF and RIFB focus primarily on a third issue of tremendous importance to America's farmers and ranchers—whether the mere fact that land retains some relatively small value and use after regulation is imposed prevents the occurrence of a compensable taking as a matter of law. If the Just Compensation Clause is not to be gutted of virtually all practical meaning—and if government regulators are to be restrained at all by that Clause—the answer to that question must be "no." On any plausible theory of takings, the destruction of almost all the value and use of land is compensable even though some minimal value and use remains. Otherwise regulators will be free to take property from individuals to benefit the public at large, free of any obligation to compensate, by the simple expedient of leaving *de minimis* value and use for the land or even—as in this case—for just a small and distinct segment of the land. If petitioner's land has not been taken, merely because a small part of it supposedly retains some economic use, no farmer or rancher is safe from huge, uncompensated regulatory burdens in the name of the public good. That is not what the Framers of the Bill of Rights contemplated.

ARGUMENT

Before focusing on the third question presented by the petition—whether a taking may occur where regulation leaves some relatively small value and use in the property—amici very briefly address why this Court should reach that issue. Neither of the Rhode Island Supreme Court's other grounds for rejecting

petitioner's takings claim—grounds that are the subject of the first two questions presented—withstands scrutiny.

I. A FORMAL TRANSFER OF PROPERTY BY OPERATION OF LAW DOES NOT TRIGGER INQUIRY INTO THE REASONABLE EXPECTATIONS OF THE TRANSFEREE IN LIGHT OF THE REGULATORY REGIME AT THE TIME OF THE TRANSFER.

The Rhode Island Supreme Court erred in attributing constitutional importance to the timing of a formalistic, involuntary 1978 transfer of the property in question from petitioner's single-shareholder corporation to petitioner in his individual capacity.

Petitioner had owned the property in some capacity ever since 1959 and 1960, acquiring another small part of it in 1969. All that happened in 1978 was that the State revoked the charter of petitioner's single-shareholder corporation, which had previously held title. As the State admits, this revocation had the effect of "devol[ving] title by operation-of-law to Mr. Palazzolo" individually. Br. in Opp. 3. Treating the date of such a formalistic, involuntary transfer as the appropriate time to determine what limitations "inhere in the title" to land as a result of "background principles of the State's law of property and nuisance" under *Lucas*, 505 U.S. at 1029, or to determine a landowner's reasonable investment-backed expectations under *Penn Central Transp. Corp.* v. *New York City*, 438 U.S. 104, 124 (1978), is inconsistent with the fairness considerations that inform the Takings Clause. See *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (the Takings Clause subjects governmental regulation "to the dictates of 'justice and fairness'").

Even assuming that the existence of a mere regulatory scheme is relevant to determining whether a taking has occurred[2]—and amici agree with the Federal Circuit that "[t]he existence of a regulatory regime does *not* per se preclude all investment-backed expectations for development" (*Franklin* v. *United States*, 2000 WL 1665135, at *11 (Fed. Cir. Nov. 3, 2000) (emphasis added))—the compensatory purpose of the Takings Clause may not be evaded by treating formal, insubstantial transfers as triggering an inquiry into the regulatory scheme in place at the time of the transfer.

To the contrary, the economic rationale behind looking at the regulatory scheme in place at the time an owner acquires land in order to determine the owner's reasonable investment-backed expectations is the assumption that the owner discounted the price he or she paid for the property to take account of regulatory restrictions on use.[3] When the transfer has occurred not as the

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[2] A regulatory permitting scheme that envisages agency decisionmaking particular to a parcel of land—such as Clean Water Act Section 404 permitting or Endangered Species Act "incidental take" permitting related to proposed habitat modification—is different in kind from a legal limitation on title that runs with the property, such as a negative easement or navigational servitude (see *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000)), and from limitations on use that flow from state nuisance law. This court has never held that a mere permitting scheme—a scheme that assumes a permit may be granted—operates as a restriction on title or is analogous to a nuisance prohibition.

[3] It follows that when a rational purchaser would not discount the price paid, or would discount only minimally, because a regulatory scheme usually does not interfere with productive use of the land—for example, the U.S. Army Corps of Engineers claims that it permits landowners to fill wetlands on their property in more than 85% of all cases governed by Section 404—that regulatory scheme

result of an arms-length sale but as the result of an involuntary transfer by operation of law—or as the result of a bequest to heirs or an inter-vivos intra-family transfer driven by estate tax or operational considerations—it is especially clear that "the prior owners must be understood to have transferred their full property rights in conveying the" property. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987). Because petitioner's single-shareholder corporation acquired the property in issue 40 years ago, before his wetlands were regulated either by Rhode Island or by the federal government, wetlands regulatory schemes are simply irrelevant to determining the scope of petitioner's property interest or investment-backed expectations.

II. PETITIONER'S TAKINGS CLAIM IS RIPE.

Petitioner applied to the state no fewer than four times to fill the wetlands on his property over the course of two decades. CRMC and its predecessors denied each permit—taking five years to do so in one instance. Pet. App. A-4. In those circumstances, where filling the wetlands is the necessary precondition for any economic use of petitioner's property and when permission to fill them has repeatedly been denied in a series of "final decisions," petitioner need do no more to ripen his federal takings claim. See *City of Monterey*, 526 U.S. at 698 (no question takings claim was ripe where municipality put a developer through "five years, five formal [plan rejections], and 19 different site plans"); *Cooley* v. *United States*, 46 Fed. Cl. 538, 540 (2000) (takings claim ripe where U.S. Army Corps had once denied landowner a Section 404 fill permit, and was not "unripened" by Corps' demands that plaintiff submit a renewed application seeking less fill). Amici agree with the Court of Federal Claims that "[f]rom the moment [a] denial [is] signed, the right to compensation vest[s]." *Cooley*,

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should have no relevance at all to determining the purchaser's reasonable investment-backed expectations.

46 Fed. Cl. at 548-549. But even if reapplication is required, petitioner more than satisfied that requirement here.

Any doubt about the ripeness of petitioner's takings claim is in any event conclusively resolved by his unrebutted testimony, as found by the trial court, that "CRMC informed him that any proposal involving the filling of wetlands would be denied." Pet. App. B-5. See *Suitum*, 520 U.S. at 739 (claim is ripe where "there [is] no question * * * about how the regulations at issue apply to the particular land in question").

III. RHODE ISLAND TOOK PETITIONER'S PROPERTY BY ERASING SUBSTANTIALLY ALL OF ITS VALUE.

The Rhode Island Supreme Court's ruling that Mr. Palazzolo retains "beneficial use" of his property is refuted by its own opinion. His property consists of 18 acres of wetlands and "no more than a few additional upland acres." Pet. App. A-3 n.1. The CRMC precluded him from filling the 18 acres of wetlands, effectively conscripting the bulk of his property to serve as "a refuge and feeding ground for fish, shellfish, and birds" and as a "buffer for flooding." Pet. App. A-3. As a result, petitioner must leave most of his land in an undeveloped state and forgo the opportunity to build the 74 single-family homes for which the land is subdivided—or, indeed, to make any other productive use of his wetland acres. Nevertheless, based on estimates that the uplands piece would be worth $200,000 if developed and that Mr. Palazzolo can obtain another $157,500 by donating the wetlands "as an open space gift," the court below held that his land retains enough value to prevent the CRMC's action from being a categorical taking.

As an initial matter, the record is less than clear as to how much value, if any, remains in Mr. Palazzolo's land. The purported $200,000 figure represents the value of one single-family house

that the CRMC concluded could be built on the upland portion of Mr. Palazzolo's land. Pet. 14; Br. in Opp. 19. That figure does not appear to account for any of the costs that petitioner would have to incur to develop the upland segment, and the decision below does not explain how building and marketing a single-family house surrounded by 18 acres of marshes and swamps would be economically feasible. Moreover, the nominal amount that may be available for donated land bears no relation to the land's commercial value. See *Del Monte Dunes, Ltd.* v. *City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996) (jury could properly conclude that City's permit denial left property owner without "an economically viable use" despite sale of property to the State of California for $800,000), aff'd, 526 U.S. 687 (1999).

In any event, even the figures used by the court below show that Rhode Island has taken "substantially all" of the value of Mr. Palazzolo's land. If his land retains $357,000 in total value, he suffered an 89 percent diminution in value from the $3.15 million that he would have reaped from the planned development of his property. The Takings Clause was intended to protect individual owners of private property from bearing such a heavy impact from government actions directed to the general public good. That is why it does not say: "Nor shall private property be taken for public use, without just compensation, *unless the property retains some value*." And the italicized phrase cannot reasonably be read into the Clause consistent with the Framers' intentions.

"[P]rotection of private property was a nearly unanimous intention among the founding generation." McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267, 270 (1988). The Framers viewed the protection of property rights, and particularly rights in land, as "the first object of government." FEDERALIST NO. 10, at 78 (Madison) (C. Rossiter ed. 1961). That conviction rested on the Framers' understanding that private property constitutes "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. NEDELSKY,

PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). Indeed, they understood government to be "instituted no less for protection of the property than of the persons of individuals." FEDERALIST NO. 54, *supra*, at 339 (Madison). Hence, the Takings Clause, a bulwark against arbitrary rule that fosters respect for individuals and their right to use and reap the benefits of their property, is fundamental to our constitutional order. As this Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

The decision below takes the heart out of the Takings Clause. It allows the government to transform private land into a wildlife refuge by decree, and, even worse, to avoid compensating the landowner simply by leaving him a smidgeon of property to develop. That distortion of the Takings Clause, and of this Court's takings cases, is an invitation to gamesmanship on the part of regulators and completely at odds with the constitutional guarantees of liberty and fairness on which our polity rests.

A. Erasing Substantially All Of A Property's Value Through Regulation May Be A Categorical Taking.

The standard applied by the Rhode Island Supreme Court, requiring that a challenged regulation leave the subject property with *no value whatsoever* to be a candidate for a categorical taking, represents an extremist and unjustifiable reading of this Court's precedents. In particular, the court below misread *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, this Court recognized that a regulation that deprives land of "all economically beneficial or productive use" may effect a categorical taking. The court below focused solely on the words *all* and *use*, ignoring this Court's clear command that compensation be paid unless the regulated property retains *economically*

beneficial or productive use. This Court has never required deprivation of "all use" or "all value" for a categorical takings claim, instead using such formulations as "economically viable use,"[4] "economically feasible use,"[5] and "economically beneficial use."[6] By failing to give effect or meaning to the modifiers this Court has attached to "use," the decision below deviated from this Court's categorical taking standard and from the mandate of the Takings Clause.

Those modifiers counsel a practical approach to measuring the deprivation of a property's economic value. The holding below—that a categorical taking is always precluded unless all value is removed from every square inch of land—cannot be reconciled with this Court's insistence that the categorical takings test comport with economic reality. Such a practical approach is reflected in *Lucas*, where this Court recognized that "requiring land to be left *substantially* in its natural state" may deprive the land of "all economically beneficial or productive use" and thus be a categorical taking. 505 U.S. at 1015 (emphasis added). See also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) (compensation is appropriate where the impact of regulation is more than "an insubstantial devaluation of petitioners' private property"). This emphasis on substantiality reflects this Court's practical perspective and refusal to elevate form over substance when

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[4] *E.g., Del Monte Dunes*, 526 U.S. at 720; *Suitum*, 520 U.S. at 736 n.10; *Dolan*, 512 U.S. at 385; *Pennell* v. *City of San Jose*, 485 U.S. 1, 18 (1988); *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495 (1987).

[5] *E.g., Lucas*, 505 U.S. at 1016 n.7; *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 191 (1985).

[6] *E.g, Dolan*, 512 U.S. at 385 n.6; *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993); *Lucas*, 505 U.S. at 1016; *Hodel v. Indiana*, 452 U.S. 314, 335 (1981).

analyzing the economic impact of governmental regulations. See, *e.g., First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987) (denying that temporary takings are "different in kind" from permanent takings).

As Justice Holmes noted in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414 (1922), when a regulation has so diminished a property right as to render its exercise "commercially impracticable," the limitation "has very nearly the same effect for constitutional purposes as appropriating or destroying it." Accordingly, an inquiry into whether purported uses are commercially practicable and purported value realistically attainable is antecedent to any determination that regulated land retains value. If they are not practicably attainable, a categorical bar to a categorical taking claim is unwarranted. See *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) ("alternative permitted activities" must be "economically realistic" and "realistically available"). This approach, amici believe, also would address the understandable concern expressed by Justice Stevens in *Lucas* about the risk of arbitrariness where "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." 505 U.S. at 1064 (Stevens, J., dissenting).

The standard applied by the court below is hard-wired to automatically reject any claim that a property regulation is a categorical taking. A court can always find some conceivable use of property. In *Lucas*, Justice Blackmun in dissent described the majority's conclusion that Lucas' property had lost all economic value as "almost certainly erroneous" because Lucas could still "enjoy other attributes of ownership, such as the right to exclude others" or "to alienate the land," and he could continue to "picnic, swim, camp in a tent, or live on the property in a moveable trailer." 505 U.S. at 1043-1044. But the Court did not adopt Justice Blackmun's suggestion that such *de minimis* or speculative uses are sufficient to defeat a categorical takings claim. Here, even if

Mr. Palazzolo can build and sell a house or erect an observation booth that attracts nature lovers, these are not reasonable economic uses of the 20 acre-plus parcel. At best, they create *de minimis* value that bears no comparison to the real commercial value of the land. See *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1181-1182 (Fed. Cir. 1994) (where permit denial left relevant parcel with only "*de minimis*" value, there was "a total taking").

The court below failed to recognize that leaving Mr. Palazzolo with "ownership" of land with little or no right to *use* it destroys his property interest. Ownership of property is a "bundle of rights" (*Dolan*, 512 U.S. at 393) that includes "the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-378 (1945); see also J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 55, at 43 (1888) ("The dullest individual among the people knows and understands that his property in anything is a bundle of rights," including "the right to use a thing in this way or that"). The Rhode Island Supreme Courts' decision treats the abrogation of one stick in that bundle—petitioner's choice as to how to use his land—as noncompensable. But the right to make "productive improvements" is an "essential use" of land. *Lucas*, 505 U.S. at 1031; see also *Nollan*, 483 U.S. at 833 n.2 (recognizing that "the right to build on one's own property" is part of the property right). And abrogation of the use stick destroys, in economic terms, the entire bundle. By rendering Mr. Palazzolo's property economically useless, the CRMC has destroyed the essence of his property rights.

Based on the above principles, the CRMC has categorically taken Mr. Palazzolo's land by preventing him from using all but a small and distinct piece of it and from using *any* of it in a viable economic sense. This case is the one forecast in *Lucas*: Rhode Island's regulation of Mr. Palazzolo's land unquestionably requires it "to be left substantially in its natural state." 505 U.S. at 1015. This Court should extinguish any lingering doubts about the

requirements for a categorical regulatory taking by, at a minimum, making clear that courts must engage in a *realistic* analysis of whether the government has effectively deprived an owner of economically beneficial and productive use of his property.

B. As In Physical Takings Cases, A Partial Regulatory Taking Should Result In At Least Partial Compensation.

Based on the impact to the property owner, condemnation is condemnation whether it is traditional or inverse. If the CRMC had physically invaded Mr. Palazzolo's land, the taking would be clear and categorical. See, *e.g.*, *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951). The result should be no different where the invasion is regulatory rather than physical. As this Court has "frequently recognized," a "radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984).

Ever since *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 177-178 (1872), this Court has instructed that the government need not physically appropriate property to effect a taking so long as the practical effect is to deny the owner use of the property. Thus, regulatory impositions, if sufficiently severe, are the "equivalent of a physical appropriation" and may categorically warrant just compensation. *Lucas*, 505 U.S. at 1017; see also *Franklin* v. *United States*, 2000 WL 1665135, at *9 (Fed. Cir. Nov. 3, 2000) (regulations may have "the same effect as a physical seizure and occupation of public purposes—leaving the owner with essentially no viable economic uses whatever and no rights except bare legal title"). As Justice Brennan explained, it makes little difference to the property owner "whether his land is condemned or flooded, or whether it is restricted by regulation to

use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

Thus, even though the CRMC would have been obliged to compensate Mr. Palazzolo if it had formally condemned his property, and even though to all intents and purposes it *has* condemned 18 acres of Mr. Palazzolo's land for use as a wildlife refuge, the Rhode Island Supreme Court says he gets no compensation. Yet his land is little or no more valuable to him now than if it had been condemned outright. Rhode Island should not be able to circumvent its obligation to pay just compensation by relying on wetlands instead of condemnation statutes.

The fact that the agency left Mr. Palazzolo with a dry spot on which to build a solitary house should not alter the legal analysis. In a formal condemnation, the government could not avoid paying compensation by seizing all of a house except the bathroom. The law should be no different when the government seizes most of an owner's land by regulation. The lack of any requirement in the Fifth Amendment that the government eradicate the owner's *entire* property interest before paying compensation was not an oversight. Everyone at the time, including the Framers, knew that if the government were to take a portion of Mt. Vernon to build a military barracks, George Washington would be entitled to compensation for the value of the portion taken. See *Bauman* v. *Ross*, 167 U.S. 548, 573, 575-582 (1897) (discussing states' historical practice of providing compensation "for taking part of a parcel of land" by eminent domain). The result should not differ simply because the governmental purpose is protecting wildlife and the government wields its regulatory rather than formal condemnation power.

Traditional property concepts illuminate the substance of the governmental encroachment here. By refusing to permit Mr. Palazzolo to make any reasonable economic use of his property,

the CRMC has effectively imposed a negative easement on it. See *Dolan*, 512 U.S. at 394 (requirement to dedicate public greenway space amounted to "a permanent recreational easement"); *Lucas*, 505 U.S. at 1019 (recognizing "the practical equivalence [of] negative regulation and appropriation"); *Nollan*, 483 U.S. at 831 (if government "wants an easement across the Nollans' property, it must pay for it"). The Takings Clause compels Rhode Island to fully compensate Mr. Palazzolo for that negative easement. If a one-half-inch cable across a property owner's roof is a compensable taking (*Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982)), and the same is true of a narrow public easement across beachfront property (*Nollan*, 483 U.S. at 841) and of government flights over chicken farms (*United States* v. *Causby*, 328 U.S. 256, 261-262 (1946)), denying compensation where regulation has rendered land almost completely useless for all practical purposes defies both common sense and basic justice.

C. The Consequences Of The Decision Below Are Absurd And Carry Heavy Social Costs.

The absolutist position of the Rhode Island Supreme Court would lead to absurd results. *Lucas* provides a ready illustration. This Court held that South Carolina's refusal to allow Mr. Lucas to build single-family homes deprived his beachfront property of all economic value and categorically effected a taking. But what if the government had left him free to place a souvenir stand on a tiny corner of his land? Based on the Rhode Island Supreme Court's decision in this case, Mr. Lucas' property would have retained *some* economic value and he would not have suffered a categorical taking. That cannot be right. If the *Lucas* decision hinged on whether he could set up a souvenir stand, government agencies could too easily circumvent the compensation requirement by leaving a small spot on a targeted property free from otherwise confiscatory regulation.

Or suppose that Smith owns 10 acres of land adjacent to Jones' 11 acres, and that a state agency requires 20 acres of wetlands (10 each from Smith and Jones) to remain undeveloped because it provides habitat for wildlife and includes wetlands. Smith and Jones each have had 10 acres of land rendered worthless. But if the Rhode Island Supreme Court is right, the agency categorically took Smith's 10 acres but not Jones' 10 acres. That cannot be the law if compensation is to be "just," as the Constitution requires.

The unfairness of the decision below is compounded by the strategic gamesmanship that it is certain to engender, which would harm not only individual landowners like Mr. Palazzolo but the public as a whole. This Court in *Lucas* recognized that permit denials of the type at issue are often based on hidden agendas and not the public good, noting that regulations "requiring land to be left substantially in its natural state [suggest] that private property is being pressed into some form of public service under the guise of mitigating serious public harm." 505 U.S. at 1018. A rule that allows government to regulate almost all the value out of an owner's land without paying compensation is bound to encourage strategic behavior and regulatory overreaching. A city could obtain parks for free under that approach simply by leaving burdened owners with tiny remnants of their land. Or an agency seeking to transform private residentially zoned land into a wildlife refuge, but unable to obtain voter approval for the large expenditure required to purchase or formally condemn the land, could accomplish its purpose by regulatory fiat, avoiding compensation by leaving the owner with control over a fragment. If an agency were free to ride roughshod over the will of the voting public in such fashion, the Takings Clause would be rendered toothless and democracy meaningless.

Such a regime also would enable government bureaucrats to curry favor among property owners by disproportionately directing the impact of regulations to less favored sectors of the citizenry without incurring the costs mandated by the Constitution. Governments could reward favored voters by providing amenities without raising taxes, simply by targeting land use regulations to portions of the properties of less favored landowners. "[A]djusting the benefits and burdens of economic life" is one thing (*Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)), but seizing from one and bestowing on another is something else again. See *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982) (Takings Clause protects against "a general economic regulation which in effect transfers the property interest from a private [party] to a private [party]"). In this case, the decision of the Rhode Island courts that Mr. Palazzolo's right to compensation is defeated by the presence of a supposedly developable dry spot on his land exemplifies the risk of reckless regulation inherent in its approach.

The holding below, that only 100 percent devaluations can be categorical takings, also would encourage property owners to engage in costly and unproductive transactional ploys. For example, if Mr. Palazzolo had sold off the uplands on his property to a confederate—or had bought the upland and wetland parcels separately, with ownership held in separate corporate vehicles—he would presumably have been eligible, if the Rhode Island Supreme Court is right, to prosecute a categorical taking claim. Such transactional maneuvering would be socially costly as well as individually unjust. See Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 568 (1984) (warning that misapplication of the Takings Clause "may cause owners to make elaborate and socially useless splits of their property rights"). The Framers did not intend, when they gave constitutional protection to the ownership of property, to encourage games subject to manipulation by the government or property owners.

To the contrary, the Takings Clause was intended both to guard against unfair and discriminatory conduct and to discourage governments from treating private property as a free good and

thereby wasting resources. If Rhode Island knows it must pay for the land it covets for wildlife and flood control, it will have to fully account for its own resources and those of all its citizens and property owners. Such accountable decisionmaking, in addition to its more general benefits, would comport with the Constitution.

The Takings Clause, after all, subjects governmental regulation "to the dictates of 'justice and fairness.'" *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). However much the government may desire to leave Mr. Palazzolo's land wet and undeveloped, there are "outer limits" to how "laudable" goals may be achieved. *Dolan*, 512 U.S. at 396. Even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 415-416; see also *Kaiser Aetna*, 444 U.S. at 180 (government's plan to make private pond into "public aquatic park" required just compensation to pond owner). In this case, forcing Mr. Palazzolo to forfeit all or almost all the value of his property to benefit the environment would unconstitutionally force him "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Reversing the decision below will permit the Takings Clause to continue to "stand as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

D. Even If The State's Taking Was Not Categorical, The Severe Economic Impact On Mr. Palazzolo Entitles Him To Just Compensation.

Based on its faulty "reasonable expectations" ruling (see *supra* Part I), the Rhode Island Supreme Court never analyzed the economic impact on Mr. Palazzolo of the CRMC's permit denial. But even if the record were sufficient to establish that Mr. Palazzolo's land retains enough value to preclude a categorical

taking, the government's action sufficiently diminished its value to constitute a taking under this court's *ad hoc* approach to takings analysis, in which economic impact is a critical factor. See, *e.g.*, *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 523 (1998).

The economic impact on Mr. Palazzolo from being forced to leave almost all of his land undeveloped is, by any token, significant. Before the permit denial, he expected to earn $3,150,000 in profits from developing his long-subdivided land. After the denial, he can obtain (at most, based on the speculative opinion below) $357,000. That loss of at least $2.79 million—some 89% of his projected return—represents an economic impact more than sufficient to trigger the just compensation requirement. See *Dolan*, 512 U.S. at 380 (city's forced dedication of 10 per cent of petitioner's land for public recreational use was a taking); *Hodel* v. *Irving*, 481 U.S. 704, 714 (1987) (taking of property interests worth less than $2000 may have "substantial" economic impact because "[t]hese are not trivial sums"); *Florida Rock*, 18 F.3d at 1567-1569 (60% reduction in value of land was enough for a taking); *Yancey* v. *United States*, 915 F.2d 1534, 1543 (Fed. Cir. 1990) (77% diminution in value).

And even if the proper measure of economic impact would compare any residual value of his land to its fair market value if filled and awaiting development, the economic impact still would plainly be very substantial, although determining the precise amount would require further proceedings below.

Mr. Palazzolo has been trying to develop his property for over 40 years, and he filed this case well over 12 years ago. The slow pace of takings cases, generally to the advantage of (if not caused by) the government defendants, unduly obstructs the prosecution of many valid claims. The authors of the Takings Clause certainly did not intend the denial of justice by delay, and amici submit that this case presents an appropriate opportunity for this Court to draw attention to this widespread problem. Mr. Palazzolo, unlike Mr.

Carstone in the *Jarndyce* case, should obtain any just compensation to which he is entitled in this lifetime, not "through disposition by the Lord." *Scales* v. *United States*, 360 U.S. 924, 926 (1959) (Jackson, J.).

CONCLUSION

For the foregoing reasons, the judgment of the Rhode Island Supreme Court should be reversed.

Respectfully submitted.

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NOVEMBER 2000